Brief for Defendants in Error

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WILLIAM A. CLARK,
Plaintiff in Error,

vs.

WILLIAM F. FITZGERALD, ET AL,
Defendants in Error.

Brief for Defendants in Error.

STATEMENT.

The defendants in error have submitted heretofore their motion to dismiss the Writ of Error herein, and their printed brief thereon.

In addition to the facts brought before the Court in the brief on motion to dismiss and also in the brief of the plaintiff in error, we desire to direct the Court's attention to one other matter, shown upon the diagram printed in connection with the opinion of the Supreme Court of Montana, and which should have some bearing both upon the merits of the case and upon the motion to dismiss:

In the diagram of the ground in controversy, printed in connection with the opinion published in the record, the Niagara Lode Claim is shown as having two end lines, and so far as can be ascertained from the plat, the vein in controversy passes through both of these end lines. According to this plat or diagram, the vein enters the Niagara Lode Claim through the east end line, passes along the general course of the claim through the south side line and continuing in its course westerly passes again into the Niagara Claim and then out at or near the southwest corner of the claim. As shown upon the diagram, the vein probably passes out of the west end line.

There is nothing in the record to show what are the facts relative to this matter. The evidence not being before the Court, there is nothing to show what, if anything, was proved on the subject, or what, if anything, the lower Court held relative thereto.

ARGUMENT

I.

What is the effect of a vein crossing both end lines of a claim when in its course it passes through a side line?

Whatever may be the opinion of the Court upon the effect of a vein entering an end line and departing through a side line and not returning again to the claim, we submit that the present case calls for the application of an entirely different principle.

In the case at bar we may say that the vein passes through both end lines of the Niagara Claim. This statement in itself, unqualified, gives to the vein extralateral rights, and if there was nothing more to the question there would be nothing for argument.

But here the statement must be qualified by adding that, for a considerable distance the apex of the vein departs from the claim.

What we shall have to say hereafter with reference to the object and purpose of end lines will apply with greater force in a case like the present, than where it is a plain question of an end line and a side line crossing.

All of the authorities which we shall hereafter cite will apply with greater force to the present case than to the facts which they have under discussion. On the other hand the Amy-Silver-

smith case upon which plaintiff in error relies most strongly cannot be applied to the present case. The ground of decision in the Amy case is that the claim is laid *across* and not *along* the vein. In the present case it cannot be disputed that the Claim is laid *along* and not *across* the vein. Both end lines cross the vein, but owing to conflicts with other claimants the Niagara has lost a portion of the apex which it attempted to locate.

We cannot think that the fact that a great part of the vein has been lost by the interference of the Black Rock Claim, can alter the rule for which we contend. Suppose the corner of the Black Rock Claim had been imposed over the Niagara Claim to such a slight extent as to take, say, a foot of the vein near the center of the Niagara Claim. Under these circumstances the Niagara would have retained, say, 1499 feet of the vein passing through both end lines of its location with a small section near the center excepted therefrom. Would extralateral rights exist under such state of facts. If so they must exist in the present case.

In addition to what we have submitted in our brief on the motion to dismiss, we desire to call the Court's attention to the additional facts hereinbefore stated as affecting the motion.

There being in this record no evidence and no bills of exception, this Court cannot be informed as to what took place in the trial court. Even the plat attached to the opinion of the Supreme Court of Montana may be erroneous, or it may be a map

constructed for the purpose of enforcing the reasoning of the opinion, as the diagram in the brief of plaintiff in error is admitted to be.

We only refer to these matters as showing the difficulties attending the review of a trial court when no questions of law are saved. As we have suggested in our former brief, whatever rulings were made upon the facts as shown were acquiesced in by the plaintiff in error, and now in the uncertainties and confusion in which we find this record this Court is asked to decide several most important and difficult questions which may or may not have been decided by the trial court. We think that the Court should refuse to do so.

Upon the record such as we have the plaintiff in error insists that the one single question of law is raised:

Do extralateral rights attach to a vein which on its strike passes through one end line and one side line of a quartz lode claim?

Without conceding that the question is raised by the record and without conceding that the vein passes through one side and one end line, but insisting that as shown by the record it passes through both end lines, we shall proceed to the discussion as though the facts were as stated by plaintiff in error and as though the question was properly before the Court for determination.

II.

Has the question ever been determined by this Court?

Counsel for plaintiff in error seems to labor under the illusion that the exact question, or a question involving the same principle, has been decided by this Court already and is inclined to criticise with some severity the decisions of other courts, that have put a different construction upon the decisions of this Court. Counsel seem to be of the impression that the lower courts well knew what this Court meant to apply as a rule under all circumstances, and that they have attempted to "evade by subterfuge" the proper construction of the statute as laid down by this Court.

We do not consider that this rather caustic criticism is at all deserved. We know of no lower courts having run counter to this Court upon this question.

Upon an entirely different state of facts, several of the lower courts have held to the doctrine of extralateral rights, and what counsel we think very illogically concludes is, that the difference in facts should not make any difference in the application of the rules laid down by this Court.

What this Court has decided as we understand it, and as we think the lower Courts have understood it, was: That when a vein on its strike crosses both side lines of a claim, such side lines become end lines, and the owner has no extralateral rights.

What the lower Courts have decided, in the cases referred to by counsel is, that where a vein crosses an end and a side line of a claim that the extralateral rights of the vein were not thereby destroyed. We shall see more of these decisions later on.

That the courts were only exercising a very proper judicial judgment in making this distinction we think should not be doubted. But aside from an independent judgment upon the question, this Court has in express terms stated that the question here presented has never been by this Court decided.

In the case of Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683, the following language is used by the Court:

"Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler Claim, the vein enters through an end and passes out through a side line, while by the amended location, it passes in and out through end lines. Of course, if the latter is a valid location, the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim, extended downward? It has been held by this Court in the cases heretofore cited that where the course of the vein is

across instead of lengthwise of the location, the side lines become the end lines, and the end the side lines; *but there has been no decision as to what extra territorial rights exist if a vein enters an end and passes out at a side line.* Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law,—that the owner of real estate owns all above and below the surface and no more? Or may the Court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?"

So far as we know, this is the last announcement of this Court upon this subject.

In view of this declaration, we do not feel that the question has been so far or at all concluded by this Court as to preclude its discussion.

III.

What is the effect upon extralateral rights of a vein crossing a side and an end line of a claim?

The statutes of the United States, under which extralateral rights are claimed and upon which they are founded, is embodied in Section 2322 of the Revised Statutes, and is as follows:

"The locators of all mining claims made, or which shall be hereafter made, on any mineral vein, lode, or ledge, situated on

the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial and local regulations, not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lie inside such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."

Section 2320 defines the extent of mining locations and concludes with the sentence: "The end lines of each claim shall be parallel to each other." This sentence taken in connection with Section 2322, above quoted, shows very plainly that the

intent of the statute as originally passed was to give to each locator upon a vein the entire vein, to whatever depth it might extend, provided it should not extend beyond the end line planes, on the strike of the vein. When the vein in its strike passes through both end lines, there is nothing left for construction, but the owner by force of the statute has the right to the vein to the entire depth, wherever it may extend, the course of the dip being determined by the angle of the parallel end lines.

If a vein were altogether regular in its characteristics so that its strike, for instance, would always be in a regular or defined line, it would be an easy matter to define its dip by declaring that it should be at right angles, or some other angle, with the strike of the vein. But the practical miner as the framer of the statute well knew, found difficulties in determining with any certainty the strike of his vein. It rarely for any considerable distance follows a straight line, while the deviations therefrom are innumerable. Strictly speaking, we might say that the true dip of the vein is at right angles with its strike. But if a vein has no true strike it is impossible to ascertain its dip. One section of the vein for a short distance will have one dip, at right angles with its strike, while a few feet further on the dip must change to accommodate itself to a change in the strike. As a result of these irregularities, one point in the dip might be covered as to true dip by several points on the apex, when the vein bends in the direction of the dip. This is well exemplified by

observing a vessel larger at the top than at the bottom. There is not sufficient vein on the dip to represent the entire apex at the top.

On the other hand, if the strike of the vein curves from the dip, there will be more vein on the dip than on the surface. The same vessel turned upside down shows this.

It was to meet these difficulties that the act of May 10, 1872, required that the end lines of each claim should be parallel, and prohibited the claimant from passing beyond these end lines extended downward indefinitely in their own direction. Thus is obviated all vexing questions of true dip, and what part of the vein under ground belongs to the apex at the surface.

This being the reason for establishing parallel end lines, it follows as a logical conclusion that the establishment of the end lines not only marks the surface lines of the miner's possession, but performs the further function of establishing the line of dip of every vein found within the boundaries of the claim. There may be numerous veins within the claim and each may have a different course with many variations therefrom, but the line of the dip for one and all is in the same direction—the direction fixed by the end line.

If we are correct in this conclusion, it is but a step to the further logical conclusion that the end line fixes the plane appertaining to each claim, in the same manner as if the geological forma-

tion were made of stratifications one against the other and each parallel with the established end lines. Whatever point on the claim may be selected, whether it be at the end lines or the center of the claim, there is no uncertainty as to what is the plane of the claim, for it has been determined by the fixing of the end lines.

As before said, there may be many veins included within the boundaries of one claim. Some of these veins may both enter and depart through end lines. Here we have no difficulty in ascertaining the legal rights of the claimants. But another vein with a different strike may be included within the same claim, which may enter an end line and depart through a side line of the claim, as in the case at bar. With several veins having various courses, it can be easily seen that a location cannot be so laid that all veins shall pass through both end lines.

And yet the statute expressly declares that the claimant shall have, "all veins, lodes or ledges, throughout their entire depth, the top or apex of which lie inside such surface lines extended downward vertically, although such veins, lodes or ledges, may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

It is to be observed that there is nowhere in the law any condition attached to this grant. It is not provided that the vein shall pass through both end lines. On the contrary, the statute grants

all veins having their apexes within the surface lines, and this grant extends to the vein to its entire depth.

As in the present case of the vein passing through one end line and one side line, we have the line of the dip fixed by the one end line crossed. The question then arises, has the law fixed another parallel and imaginary end line at the point where the vein crosses the side line?

If the law has not expressly or impliedly established such a line, will not the courts establish it for the purpose of carrying out the very evident intention of the law-maker?

We think the law has itself by an irresistible implication supplied the line. As we have before argued, the plane of the claim, and consequently the plane of the dip of each vein, has been fixed and determined in the establishment of the end lines. The vein to its entire depth has been granted to the claimant. The only difficulty in the way of giving efficacy to the grant is in determining what dip shall attach to the vein. If the law has established the dip, as it certainly has, all difficulties disappear and the grant becomes perfect.

If, however, it be held that such a line is not established by the statute, then we submit that the Court should construct one in order that the fair, reasonable and evident meaning of the statute may be given effect. In the construction of this, as of every other statute, the purpose and intention of the law is to be

sought. If it be necessary to establish a line in order that the purpose of the law-maker may be carried into effect, then it is not only the right, but the plain duty of the Court to establish it. By so doing, the purpose of the law is secured, while on the other hand, the refusal to do so defeats the purpose. But even after the Court has declared the line to exist, it cannot be said to be a creation of the courts, for the law, at least by intendment, constructed it.

If there be any objection to the establishment of a new end line at the point of departure, it would be equally well to leave it undone. All that is contended for in cases of this kind is that the owner of the vein may follow it on its dip wherever it may go. Why may it not then be said that the owner of the claim is the owner of the vein, so far as it is included in his claim, and that he has the right to follow it on its dip, that dip being determined by the plane of the claim as established by the end lines? Such a construction would be in accordance with the spirit and letter of the law, and would be free from the objection of judicial legislation.

We believe that this statute has been construed as we contend for, by nearly all of the lower courts, and we think we may say with confidence that it has been so construed unanimously by those directly interested in the mining industry. This construction being from a practical standpoint and having been contemporaneous with the enactment of the statute, and having con-

tinued and been acted upon in all practical matters since, we submit should have respectful consideration, from this and all courts in the determination of this question. These considerations we admit should not be urged if such constructions were plainly contrary to the intention and meaning of the law. On the contrary, they seem to us to be in accordance with the just and fair construction of the statute.

IV.

As to certain practical objections urged by plaintiff in error:

Counsel for plaintiff in error refers to the conditions existing in the Amy-Silversmith case, a diagram of which appears at page 20 of the printed record in this case. Counsel then asks the Court to suppose the strike of the vein so changed that it would pass through the west end line, instead of through the north side line, as shown in the diagram. Counsel then asks if such a slight change could make any difference in the rulings of the Court. The difference in facts is between a vein crossing an end line and a side line. The difference in law is the very question now under discussion.

If, after counsel had readjusted the claim to the vein in such a manner that one end line crosses the vein, he had made a like adjustment, so that the other end line should in like manner cross it, we should have a claim laid along and not across the vein. In such a case the vein would unquestionably have extralateral

rights, although the adjustment to bring about this effect might be very slight. In like manner we contend that the differences supposed by counsel, while slight, constitutes the difference between a vein having and one not having extralateral rights.

There is also shown in counsel's brief a diagram, used for illustration. From this diagram it is contended that conflicts might occur in underground rights by reason of the fact that veins cross one side line of a location. We submit that these conflicts are quite as likely to occur in cases where veins cross both end lines as where they cross an end line and a side line.

Take for instance this same diagram, and instead of having the Niagara Claim represented by the figure 1, 2, 3 and 4, let us suppose that the Niagara Claim is represented by the parallelogram A, B, 3, 2, and that the Black Rock Claim and the vein remain as they are represented on the diagram. Here we would have a vein passing through both end lines of the Niagara Claim, and the identical complication arising which counsel claim to avert by destroying the extralateral rights of the Niagara Claim.

An inspection of a map of any important mining district will show claims laid in most irregular fashion. The extralateral rights attaching to these claims must be always theoretically and very often in practice, very conflicting. This results, whether the veins pass through both end lines or one side line, and the

denial of extralateral rights altogether, in either instance, would not tend to cure the trouble.

It is a demonstrable fact that extralateral rights on a vein crossing a side line would not and could not complicate the situation more than it would be complicated by veins passing through both end lines.

V.

The adjudicated cases upon the question:

Counsel for plaintiff in error have cited several cases which it is contended support the doctrine as applied by them. Among the cases cited are several decisions from this Court which are claimed to have special applicability. We think these decisions could be shown upon review to be founded upon the peculiar facts of the cases decided. But in view of the declaration of this Court, that a case like the present has never been decided by this Court, we refrain from the useless labor of attempting to convince the Court that it was correct in that declaration.

So we think we may conclude that the question so far as this Court is concerned, stands undecided. As to the other cases cited by plaintiff in error, a slight examination will show that none of them support the views contended for.

In *Montana Company vs. Clark, 42 Fed., 626,* Judge Knowles held that a claim in the form of an isosceles triangle could not claim to have extralateral rights, for the reason that it

could not have parallel end lines, as required by law. As we have before argued, no plane of the dip was established in the location of the claim.

In *Colorado Cent. Con. M. Co. vs. Turck, 50 Fed., 888*—Judge Thayer, writing the opinion in the Circuit Court of Appeals, held that, when a vein forks and the apex of one fork passes into another claim that such fork belongs to such claim. A question over which there should be no contention. But in that case the Court went further and did as we contend should be done—drew an end line at the point of the departure of the vein through the side lines, and by such lines defined the extralateral right of the vein. At page 896 of the decision the Court says:

"If the vein on which the Colorado Central Location rests became divided as it entered the disputed territory, and the outcrop of one fork crossed into the Aliunde territory, then it followed that the Colorado Central claim had been laid rather obliquely to the course of the outcrop, and in that event we are of the opinion that the defendant lost that fork of the vein which had passed outside of its sidelines. In other words, so far as that fork is concerned, the south end line of defendant's Colorado Central Claim must be regarded as *a line drawn through the point where the outcrop passed through its south side line.*"

It is therefore plain that this is an authority for the position taken by us.

In *Blue Bird M. Co. vs. Largey, 49 Fed., 289*, the defendant moved to remand the cause to the State Court. In the course of the opinion remanding the cause, Judge Knowles used the following language:

"But if it should appear that the apex of the Blue Bird vein did not pass through the end lines of that claim, but passed through one end line and one side line, then the rights of plaintiff, at least, are determined by the case of Iron Silver Min. Co. vs. Elgin Mining and Smelting Co., 118 U. S., 196; 6 Sup. Ct. Rep., 1177."

"As to the right of plaintiff to follow its vein outside of its side lines, if its apex is not cut by both end lines of its claim, was fully determined in the case of Iron Silver Min. Co. vs. Elgin Mining and Smelting Co., supra, just referred to."

It will be seen that the decision was based altogether upon a construction of a decision of this Court. If that decision does not bear the construction given it, then Judge Knowles' decision would be without weight.

The case of *Tombstone M. & M. Co. vs. Way Up M. Co., 25 Pac., 794*, is a cause decided by the Supreme Court of Arizona. The Court held that where a vein crosses both side lines of a claim no extralateral rights attach to such veins. The question decided in this case is identical with that decided in the Amy case, and is not an authority for the plaintiff in error.

McCormack vs. Varnes, 2 Utah, 355, is a case in which the vein passed both side lines of the claim on its strike and the Court held that the claimant could not pursue the vein beyond the side line *on its strike*. We do not find that the question of dip was raised or discussed in the case.

Thus we find that in not a single case cited by plaintiff in error was the question here in issue discussed or decided.

On the other hand this identical question has arisen and been decided, as we contend is correct, in the following cases:

Tyler M. Co., vs. Sweeney, 54 Fed., 284.

Consolidated Wyoming G. M. Co. vs. Champion M. Co., 63 Fed., 540.

Del Monte M. & M. Co. vs. New York & L. C. Min. Co., 66 Fed., 212.

Tyler M. Co. vs. Last Chance M. Co., 71 Fed., 848.

Carson City G. & S. M. Co. vs. North Star Min. Co., 73 Fed., 597.

Republican M. Co. vs. Tyler M. Co., 79 Fed., 733.

Fitzgerald vs. Clark, 17 Mont., 100 (the case at bar).

The question is also discussed and the same principle announced in,

Doe vs. Sanger, 83 Cal., 203.

In *Tyler Mining Company vs. Sweeney, 54 Fed., 284*, Judge Hawley discussing this question, at page 292, says:

"If the lode in question, instead of extending into the Last Chance Location, had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there would certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course, for its entire depth outside of the vertical plane drawn through the side lines. The fact that it continued its course and crossed the side line does not in any manner change this principle. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice and authority, it seems to us, is the only reasonable construction that can be given to the statute."

Judge Hawley again in discussing the case of the *Consolidated Wyoming Co. vs. Champion M. Co., supra,* says:

"I am of opinion that in such cases the statute is definite enough and clear enough to make the end lines parallel at the point of the entrance and of the departure of the lode across the side lines and to draw them crosswise of the general course of the lode within the limits of the surface location, and that this should always be done, so as to give to the locator just what the statute evidently intended he should have, instead of depriving him of all extralateral rights because, by some mistake or oversight in

making his lines, or by lack of judgment or knowledge as to where the lode ran, he had failed to get his lines exactly parallel with the lode and had marked his end lines at a point beyond where the lode was found to exist upon its strike within the surface lines of his location. But be that as it may, the Amy case does not go to the extent of deciding that if the lode passes through one end line and in its entire course is nearly parallel with the side line, which it crosses before reaching the other end line the locator would be deprived of all his extralateral rights."

And again:

"The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. When the prospector discovers a vein of ore of sufficient value to justify the expenditure of time, labor and money to open up and develop the same he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral as to the depth of such lode upon its dip, the apex of which is within the surface lines of his location."

And again:

"One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the Court as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered by the Court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

Judge Hallett in the case of *Del Monte M. & M. Co. vs. New York & L. C. M. Co., 66 Fed., 212,* used the following language:

"If the strike of the lode in the New York Location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim.

This is asserted as a proposition of law deducible from several decisions of the Supreme Court that the lines of a location crossed by the apex of a vein on its strike, shall, as to such vein, be regarded as end lines, whatever their position may be; and if this proposition be accepted the south end line and east side line intersected by the outcrop of those lodes are not parallel to each other, as demanded by Section 2320 of the Revised Statutes. This, however, has not been the interpretation of the law in the Supreme Court, or in any court, so far as we are advised. It is true that in the Flagstaff Case, 98 U. S., 463, and recently in the Amy-Silversmith Case, 152 U. S., 223, the Supreme Court declared that the side lines of a location shall be end lines whenever the lode on its strike crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principles of these decisions. We have a lode extending on its strike on the general course of the location and within its side lines, a distance of 1,070 feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side line. No reason

is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere, because the Court cannot make a new location or in any way change that made by the parties.

Iron Silver Min. Co. vs. Elgin Mining and Smelting Co., 118 U. S., 196.

This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and if there be magic in the word "line" it will be better not to use it."

Judge Beatty in discussing the same question in *Tyler M. Co. vs. Last Chance M. Co., 71 Fed., 848*, says:

"What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following, "all veins, lodes and ledges throughout their entire depth, the top or apex of which lie inside of his surface lines." Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he

owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner. Courts will not fritter them away by engrafting into the law antagonistic common-law principles, or other judicial legislation. Is there any difficulty in applying these rights to a location wherein the ledge passes through an end and a side line? What are the planes that must then bound the underground rights? It will be conceded that the plane of the end line through which the ledge passes shall be one. The statute says that the right to follow the ledge along its course underground shall be limited by the planes passed through the two end lines, but it is manifest that this rule cannot be followed when the apex of the ledge, before reaching the other end line, passes out of a side line, for it would give the locator more of the ledge underground than he has of apex. It would give him a portion of the ledge of which he does not hold the apex, and to hold that his ledge shall be cut off by the vertical plane of his side line is cutting off the right to follow it down which the law has given him. Instead, thereof, to establish at the point where the apex crosses the side line a vertical plane, parallel to the plane of the end line cut by the apex, and allow him to follow the ledge on its dip between these two planes, is not in violation of any provision of the statute, and gives the miner no greater rights than the statute intends he should have. The courts by the cases above cited

have so held, and it is now held that the plaintiff can so follow its edge so far as not in conflict with some prior right."

The identical principle is again announced in the other Federal cases cited. The opinions were written by Judges Hawley and Beatty, both of whom we have before quoted in other cases.

The opinion of the Supreme Court of Montana in the case at bar is printed in full in the record and speaks for itself.

After this review of the cases, and we think every case upon the subject has been cited, we feel that we may confidently reassert what has been before said, that there is practical unanimity among the courts of the mining States upon the question here at issue. The judges of these courts are to a greater or less extent informed upon practical mining questions, and upon the difficulties to be met and disposed of in applying the reasons and principles that led up to the enactment of the statutes. They have seen, as probably none could see and understand, except those who have become familiar with such matters in a practical way, what are the necessities of the practical miner. They also understand what construction of the statute would best subserve, not individual interests, but the general interest and welfare of large and important communities where mining interests are of vital import.

We therefore urge with some importunity, in the interest of the principle and not in view of the special case, that these

courts be given a proper hearing and due consideration in the determination of this very important question.

JAMES W. FORBIS,
Attorney for Defendants in Error.

No. 145.

Sup. Ct. U.S.
FILED
DEC 6 1897
JAMES H. MCKENNEY
CLERK

Sup. Ct. Bx. of Forbis for Defs. in Error.

Filed Dec. 6, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 145.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

JAMES W. FORBIS,
Attorney for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-6-'97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 144.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

Since the brief of defendants in error was filed in this Court a very able (and perhaps the first) text book upon the laws of mines has been issued. We refer to Lindley on Mines, and ask the Court to permit us to add to our former brief some citations from this work. Especially is this appropriate for the reason that the case at bar is ably discussed in the light of all decisions referred to in the briefs of both parties, and the author holds that the reasoning of Judge De Witt in this case is logical and conclusive. We quote from sections 591 and refer the Court to former and subse-

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 144.

WILLIAM A. CLARK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. FITZGERALD ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

Since the brief of defendants in error was filed in this Court a very able (and perhaps the first) text book upon the laws of mines has been issued. We refer to Lindley on Mines, and ask the Court to permit us to add to our former brief some citations from this work. Especially is this appropriate for the reason that the case at bar is ably discussed in the light of all decisions referred to in the briefs of both parties, and the author holds that the reasoning of Judge De Witt in this case is logical and conclusive. We quote from sections 591 and refer the Court to former and subse-

quent sections of the same work for text as well as for diagrams:

"Let it be conceded absolutely that where a vein crosses any line of a location, the crossed line becomes an end line in the sense that it stops the right of pursuit on the *course or strike* of the lode. All courts agree upon this.

"The doctrine applied by Judge De Witt in the King-Amy and Fitzgerald-Clark cases, by Judge Hawley in the Tyler-Last Chance case, and by Judge Hallett in the Del Monte case recognizes this fully. The doctrine as contended for by them constructs a plane with reference to a boundary crossed by the lode lawfully designated by the locator as an end line.

"It stops the pursuit of the vein on its strike, which result is also accomplished by the crossed line. It gives to the locator as much of the lode in depth as he has within his surface lines. It takes away nothing that could be lawfully appropriated by any one else. A case more forcibly illustrating the inherent equity of the rule than that shown in Fitzgerald *vs.* Clark could hardly be assumed.

"If the extreme doctrine is to prevail, that no extra-lateral right is to be allowed where a vein crosses an end and a side line, the Niagara's rights are cut off by a plane drawn through its south side, H B. This gives to the Black Rock an underground segment of the vein underlying its surface for its full length, with only a small portion of the apex. In other words, it holds more of the vein underneath within its own boundaries than it has overlying apex, but its pursuit of the vein on its downward course is cut off by the plane drawn through L M, its south side line. The remainder of the vein lying south of such vertical plane cannot be thereafter appropriated by any one under the mining laws, because there is no apex upon which to predicate such a location. Either the Niagara or the Black Rock, had they been able to obtain sufficient knowledge of the position and course of the vein, might have taken the full length and depth; but, as they were mistaken in their surmises as to the course of the vein, and so made their locations that it crossed the common side boundary, one receives practically nothing and the other obtains something which the law did not intend he should have, and fails to receive all

of the vein underlying his apex, which the law contemplated that he should take.

"If, on the contrary, Judge De Witt's theory is adopted and a bounding plane, A K, parallel to the end line H L is applied at A, the point of crossing the side line, each locator receives a segment of the vein throughout its depth equal in length to the apex within its surface boundaries. There is a complete appropriation of the vein for the entire length and depth. Any subsequent location would be necessarily based upon a portion of the apex not included within the boundaries of either the Niagara or Black Rock, and such junior locator would have no just cause of complaint. This seems to fulfill the intent and spirit of the law. It gives to the locator as much of the vein as the irregularity and imperfection of his location will permit without depriving others of any legal rights. It brings order out of chaos, and certainty out of uncertainty. It does substantial justice to all concerned. Is not this the true end and object of statutory interpretation?

"The objection that this is a judicially constructed end line seems to us to be plausibly met by the reasoning of Judges De Witt, Hawley, and Hallett. The application of such a plane is neither arbitrary nor conventional. The direction of it is fixed by reference to the line properly designated by the locator as an end line. While the rule yet awaits the authoritative sanction of the Supreme Court of the United States, when we consider the practical unanimity with which both trial and appellate courts in the mining regions have accepted it as the only proper solution of the question, we express the belief that the Court of last resort will not withhold its approval."

Another new work, entitled "The Law of Mines and Mining in the United States," by Barringer and Adams, which has likewise been published since the filing of our brief, lays down the following principles at page 440:

"The locator is bound by the lines which he himself lays out, and the courts have treated those lines as end lines through which the vein passes on its strike or course across the country, whether the locator so intended them or not. If, therefore, the location is made across the vein, the side

lines become the end lines, and in following the vein upon its downward course he is confined *within the plane drawn vertically through those lines* extended. *If, however, one of the end lines as drawn crosses the vein, which on its onward course through the claim passes out of one of the side lines before reaching the other end line, the law will establish one new end line, which is a line parallel to the other end line as laid out, but passing through the point where the apex of the vein as it passes out of the claim intersects the side line, the other end line remaining the same as laid out.* The locator may even himself abandon the portion of his claim beyond this point of intersection and lay out a new end line as above."

Respectfully submitted.

JAMES W. FORBIS.
Attorney for Defendants in Error.